THE PRINCIPLES
OF
INTERNATIONAL HUMANITARIAN LAW[1]

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II

III. THE PRINCIPLES

Alongside the rules which constitute the enacting clauses of the international Conventions and which, in precise terms, set forth the contractual obligations of States, there exist principles from which these rules derive. " Certain ideas formulated with deliberate imprecision occupy a privileged position in treaties which describe them as being creative elements of law ".[2]

Sometimes the Conventions expressly refer to these either in preambles or even in the main body of the text. Thus they speak of the " laws of humanity ", " recognized custom " and of the " dictates of the public conscience ".

One should mention the so-called Martens clause of the preamble to the Hague Regulation: " populations and belligerents remain under the safeguard and influence of the *principles* of the law of nations, as they result from the usages established among civilized peoples ". In an article common to the Geneva Conventions of 1949 it is stated: " Each Party to the conflict . . . shall ensure the detailed execution of the preceding Articles, and provide for unforeseen cases, in conformity with the *general principles* of the present Convention ". And in another article, the Parties undertake

[1] See *International Review*, September 1966.

[2] Henri COURSIER, *L'évolution du droit international humanitaire*, Leyden, 1960.

to disseminate the Conventions " so that the *principles* thereof may become known to the entire population . . .".

In international humanitarian law, as in every other juridical sphere, principles are of capital importance. They motivate the whole, enable the respective value of the facts to be appreciated and also offer solutions for unexpected cases. They contribute towards filling gaps in the law and help in their future development by indicating the path to be followed. As a summary they can be easily assimilated and remembered.

In the field of law now under study, the principles represent the rudiments of humanity, a minimum applicable at all times, in all places and circumstances which are valid even for States which may not be parties to the Conventions. Although based on written law, they are part of the custom of peoples from which none can disengage himself. The Red Cross remains true to its mission by placing, in front of the positive rules formulated by the Conventions, the principles which preceded them and from which they originated. As Sophocles has said, " above the written laws, there are those which are unwritten ".

The Geneva Conventions, by their article 3 common to them, stipulate that States shall apply certain rules in the case of conflict not of an international character. One paragraph in this article lays down, that " the parties to the conflict shall further endeavour to bring into force, by means of special agreements, all or part of the other provisions " of the Conventions. It is to be hoped that the principles of humanitarian law may serve as a basis for agreements of this kind, the conclusion of which would be extremely desirable.

There is no doubt that certain of these go back to the distant past, but it is in modern times that they have assumed a written form and only from 1864 onwards have they had the character of multilateral agreements. Such as we have formed them, they have been drawn entirely from positive law. However, because of their general character one would often seek in vain for wording in the conventional texts.

The principles of international humanitarian law have not, as far as we know, yet been the subject of any systematic declaration. It appears to us that one could reduce the substance of this law to a few very simple notions, about fifteen in all, closely linked and in

logical sequence, each one of them being subdivided in turn into several principles of application. This we have attempted to do in a few lines and in simple form, following them up with brief comments.

1. Fundamental principles

The fundamental principle of humanitarian law is the result of a compromise between opposed notions: the principle of humanity and the principle of necessity.

We have seen when studying the sources of humanitarian law, that **humanity requires action always for man's good.** On the other side, by the nature of things can be found a principle of necessity, namely **the maintenance of public order legitimates the use of force; the state of war justifies resort to violence.**

PRINCIPLE OF HUMANITARIAN LAW

Respect for the individual and his well-being shall be assured as far as it is compatible with public order and, in time of war, with military exigencies.

From the very beginning of life, human beings opposed each other. In all ages, men have suffered under the sword and the yoke; the pages of history are filled with blood. Everywhere one sees massacres, torture, oppression. Why?

When a comparative study is made of civilization, one finds that the concept of life and the world often rests on a dualism, on the existence of two fundamental factors which face each other and between which human beings find themselves placed. In Europe, the man in the street at once thinks of the opposition between good and bad. But this is too simple and arbitrary an explanation. In the dualist concepts, the two elements can each have their own value and even join them.

This dualism has its origin in the roots of human psychism. There is a striking passage to this effect in a letter written by Sigmund Freud to Albert Einstein, two men of genius:

> You are surprised that it is so easy to incite men to war and you assume that they have in them an active principle, an instinct of hatred and destruction all

ready to welcome this form of excitement . . . We admit that man's instincts are composed of two categories: the ones who want to preserve and unify, we call them " erotics ", and those who want to destroy and kill, whom we cover with the terms " aggressive impulse " or " destructive impulse ".

These impulses are both indispensable to each other. It is from their concerted or antagonistic action that are derived the phenomena of life. Now, it would appear that it scarcely ever arises that an instinct of one of these two categories can assert itself in isolation; it is always bound up with a certain amount of the other category, which modifies its object or, as the case may be, alone enables it to accomplish it. Thus, for example, the instinct of self-preservation is certainly of an erotic nature, but it is precisely this same instinct which must resort to aggressiveness if it wants to see its intentions triumph. In the same way, the love instinct brought to objects has need of a quota of the possessive instinct, if it wishes definitely to enter into possession of its object. And it is precisely the difficulty one experiences in isolating these two sorts of instinct, as they show themselves, which has prevented us from recognizing that for so long.[1]

In this way, then, man will seek to kill, to do harm, to dominate and he will use violence and by derivation will cause suffering, so that he himself may have a greater chance of surviving, to raise himself and to increase his power. In each of his fellow men he first of all sees a rival.

Amongst certain animals, when one of them is wounded or weakened, members of the same species fall on him and destroy him. This is what men have had to do to each other for many thousands of years. Then the defence reflex and a need for security were extended to the group.

To make this community life possible, it was necessary to organize society. As it was impossible to change man's nature, one recognized that his instinctive reactions should be kept in check and force him to accept reasonable solutions. Carrying out a major revolution, the community thus created a social order out of which it has progressively defined the broad outline expressed in an abstract manner through moral principles.

The power capable of having these standards respected has also been established, without which they would have remained a dead-letter. This then is the origin of law and of public institutions.

[1] International Institute of Intellectual Co-operation, League of Nations, 1933.

However, it was also necessary to place limits on this power. For if the State has as its ultimate object the development of the individual personality, it risks crushing it at the same time. Its domination is blind and it extends itself until it is stopped. It was therefore necessary to guarantee certain fundamental rights to man, making existence acceptable to all. It was thus that the principle of respect for the human individual originated, respect for his life and liberty and finally his happiness.

This vast and slow evolution, for a long time confined within the limits of each State, ended by reaching the level of international relations where law was soon to come to grips with war. It was no longer a question of merely sparing man when in conflict with society, on account of the established social order, but also with the enemy himself when his country starts to fight another.

Not being able to claim from the outset to break the scourge of war itself, attempts were made at least to attenuate its unnecessary rigours. The reciprocal interests of the belligerents forced them to observe certain " rules of the game " in the conduct of hostilities. Such are the origins of the laws of war which constitutes a most important part of public international law. This achievement, it is unnecessary to say, is as difficult to pursue in the international field as it had been on the internal level. It is, moreover, far from being realized and one could even say that it has scarcely begun.

Today a new evolution is taking place. The modern world is full of political ideologies all aiming at domination for their own ends, if necessary by force, including the secret world of men's thoughts. As against this, one can see a proliferation of subversive movements which, also through the use of force, strive to change the established order. The result is a climate of extreme tension between States sometimes known as the cold war and within States struggles between factions seeking each other's destruction. It often happens that a section of the population is subjected in its own country to special legislation, deprived of liberty merely for its opinions, is arbitrarily confined and, finally, treated less well than enemy troops captured under arms.

We have seen how during the course of history law first developed within the community. Attempts were then made to extend some of its factors to war on an international scale, then to civil war.

By a strange and surprising reversal of things, the laws of war now have to be applied in time of peace and for dealing with the internal affairs of countries. There is, however, no paradox here.

For, it is increasingly believed that the rôle of international law is to ensure a minimum of guarantees and of humanity for all, whether in time of peace or in time of war, whether the individual is in a state of conflict with a foreign race or with the community to which he belongs.

The principle of humanitarian law such as we have formulated it is a relationship of proportion. In the two hypotheses we have just mentioned, man must be spared, but this he can only be to a reasonable extent.

From the principle of humanitarian law can be inferred the principle of the laws of war and that of the rights of man.

PRINCIPLE OF THE LAWS OF WAR

Belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy.

War is contrary to the normal state of society which is that of peace. As Lorimer [1] has observed, war is only justified by necessity, it cannot and should not serve as an end in itself. Lawfully it can aim at its own annihilation.

In fact, war is a means, the ultimate one, for a State to bend another to its will. It consists in employing the necessary constraint in order to obtain this result. All violence which is not indispensable for achieving this object is therefore without purpose. It then becomes merely cruel and stupid. According to Montesquieu's famous formula, international law rests on " the principle that the various nations should do as much good to each other in time of peace and the least possible harm without damaging their true interests in time of war ".

To achieve its object, which is to conquer, a State engaged in a conflict will seek to destroy or weaken the enemy's war potential at

[1] James LORIMER, *The Institutes of the Law of Nations*, 1886.

the cost of the least loss to itself. This consists of two factors, man-power resources and the materiel he has at his disposal.

Human potential, by which we mean individuals contributing direct to the war effort, can be used either to kill, wound or capture. There is no difference between these three methods as regards military output. To be cynical, all three are capable also of eliminating the enemy's vital strength.

On the humanitarian level, reasoning is somewhat different. Death here appears as the final and irreparable evil. There are also many degrees in the extent of a prisoner's suffering. Humanity therefore demands that capture should be preferred to wounds, the latter to death. One should spare non-combatants as far as possible and that when wounds are inflicted as lightly as circumstances permit, to enable the wounded to be operated upon and be healed. Captivity should also be made as bearable as possible.

Military commanders can understand this language, and they have often understood it, since they are not asked to forgo carrying out their duty as soldiers and patriots, as they can attain the same result by inflicting less suffering. Once he is rendered innocuous by wounds or capture, the enemy no longer plays a rôle in the progress of operations and the final outcome of the struggle. It is therefore useless to prolong his suffering through lack of care or ill-treatment, even from the most realistic point of view.

Bluntschli [1] had already written:

> International law completely rejects the right to dispose arbitrarily of individuals. It does not authorize either ill-treatment or violence against them. The enemy can only undertake measures which military operations require. War is never an end in itself, but a means for right to be respected or to have the purposes of the States realized. The forces involved in a war are not of an absolute character. War must be limited and cease as soon as it no longer serves the State's purpose.

Thus, the old motto of the rules of war " do as much harm to your enemy as you can ", has been replaced by the new law, " do not inflict more harm on your enemy than the object of the war demands ".

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[1] J. K. BLUNTSCHLI (1808-1881), Swiss jurist, author of : *Le droit international codifié.*

PRINCIPLE OF THE LAW OF THE HAGUE

Belligerents do not have unlimited choice in the means of inflicting damage on the enemy.

This principle is derived from the previous one and what we have just said about the latter is also applicable.

It should be pointed out that the XXth International Conference of the Red Cross which met in Vienna in 1965 expressly confirmed this principle in the declaration it made on some of the standards to be applied in all circumstances in the conduct of hostilities. Amongst these can be found: " Parties engaged in conflict do not have unlimited choice of methods to inflict damage on the enemy ".

The rules which derive therefrom will be discussed under a special heading.[1]

PRINCIPLE OF THE LAW OF GENEVA

Persons placed hors de combat and those not directly participating in hostilities shall be respected, protected and treated humanely.

This concept is inferred from the more general principle governing the law of war as a whole.

In the face of the most formidable deployment of force ever known to the world, the Red Cross erected the fragile barriers of humanitarian law. These were to be intangible only in proportion to the value placed on human life. " All the provisions of this law are but the affirmation, each time renewed, that the victims of conflicts are first of all human beings and that nothing, not even war, can deprive them of the minimum which respect for the individual demands ".[2] Humanitarian law demands that each person be treated with humanity, that is to say as an individual and not as an object, as an end in himself and not as a mere means. To regulate this treatment of man by man is the characteristic of the Geneva Conventions.

The principle of Geneva lays down three duties towards the victims of war: to respect them, give them protection and treat them

[1] See heading 4 below.

[2] Frédéric SIORDET, *Inter arma caritas*, ICRC, Geneva, 1947.

humanely. These notions are very close to each other, but they are not synonymous. They have subtle distinctions, but when joined together they form a complete and harmonious whole. There may perhaps exist a language in which there is one word signifying these three things at the same time.

To respect is an attitude of a more or less negative character one of abstaining, meaning: do not harm, do not threaten, spare the lives, integrity and the means of existence of others, have regard for their individual personality.

To protect is a more positive attitude. It is a question then of preserving others from evils, dangers or suffering to which they may be exposed, to take their defence and give them aid and support.

As regards *humane treatment*, it would be useless and hazardous to enumerate all it constitutes, since it varies according to circumstances and one's imagination will always be less swift than that of those who do harm. To determine it is a question of common sense and good faith. In the law of Geneva, humane treatment is a minimum to be reserved for the individual to enable him to lead an acceptable existence.

We will encounter these three notions in many of the principles of application which we will be having occasion to define.

PRINCIPLE OF HUMAN RIGHTS

The individual will see at all times guaranteed the exercising of his fundamental rights and liberties, as well as the conditions of existence propitious to the harmonious development of his personality.

We now enter a different sphere. It is no longer a question of protecting man against the evils of war, but against the abuses of the State and the vicissitudes of life. If the legitimate defence of States justifies certain deviations from the free exercise of the rights of the individual, they should not go beyond what is necessary for the safeguarding of the State. To determine this limit and find a reasonable compromise is the attribute of legislation of human rights. We have now arrived, and this is to the credit of the United Nations, at a concept of determining the status of the individual, valid at all times and in all places, in opposition, even and above all,

to the authorities of his own country of origin. This status comprises the declaration of these essential rights and freedoms, the foundations of justice and peace in the world, which are inseparable from the individual and of a life worthy of that name. Then taking one step further, the need is recognized of ensuring that everyone enjoys decent conditions of existence enabling him to attain a certain level of well-being. By the terms of the preamble to the Universal Declaration adopted on December 10, 1948, it was a question of aiming at the " advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want ", so that man shall " not be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression ".

It is not, however, a matter of only giving encouragement to those making demands. If there are rights, there are also duties. It should never be forgotten that each man's rights end where those of others begin and that every individual has contracted duties towards the community which offers him an atmosphere favourable to the development of his personality. What each one asks for himself, he should therefore also grant to others.

From the fundamental principles which we have just mentioned, others are derived which we have divided into four categories: the principles common to the law of Geneva and to Human Rights, those which relate to the victims of conflicts, those referring to the laws of war and those which are proper to Human Rights.

2. Common principles

PRINCIPLE OF INVIOLABILITY

The individual has a right to the respect of his life, integrity, both physical and moral, and of the attributes inseparable from his personality.

Everyone knows that life is the most precious of all possessions. If, therefore, one does not accord man the right to live, none of the other rights have any sense at all.

The respect of life naturally means the exclusion of combatants in the case of conflict and, at all times, capital sentences regularly

pronounced, in countries in which the death penalty still exists, and also that of legitimate defence. Capital punishment, by its barbarous and irreparable character, seems to us, moreover, to be scarcely compatible with the sentiment of humanity, nor more with real justice, which should aim at saving human beings. One would hope to see it sometime disappear from the surface of the globe. " Blood cannot be washed away by blood ", as Shakespeare said.

This also applies to physical and moral integrity. One can see that the human being has sensibility and therefore is sensible to happiness and to suffering. That is sufficient for one to treat him with consideration, to cause him no harm and even to provide him with some pleasure. In recognizing this truth, by introducing him into its own customs, because it was in conformity with the aspirations of the majority, society has made a right of this, already proclaimed in the XVIIIth Century. The above can also to a certain extent apply to animals. Indian philosophy has already foreseen this, by prescribing respect for all life.

The principle of inviolability can be explained by the six principles of application which it governs:

1. A man who has fallen in combat is inviolable : an enemy surrendering shall have his life spared.

It is obvious that this principle only concerns combatants. Place has been given to this here only for classification reasons. It is the key-stone of the Geneva Conventions. One can only kill a fighting man who is himself in a position to kill. Once all aggressiveness has been abandoned an end must be put to hostile action.

It is not necessary to return to the argument which has brought us to the principle of the laws of war. It is equally valid here.

2. Torture, degrading or inhuman punishment are forbidden.

Amongst the practices which are condemned, that of torture to extract information appears to be the most reprehensible and dangerous. For the individual, it is the cause of unspeakable suffering. It is also a serious affront to the dignity of man, forcing him to perform acts and make statements against his will and even degrad-

ing him to the level of a slave in the barbaric age. Furthermore, it degrades as much the man who inflicts it as his victim.

There are some who claim today that torture is in the interest of the community and is compatible with legality. However, since the end of the XVIIIth Century, when judicial torture was abolished, such a method has been universally rejected by civilized nations. It is a cause for anxiety that one can observe its return, more or less clandestinely, sometimes under the cover of emergency laws against alleged terrorism.

It would be a disastrously retrograde step for humanity to try to fight terrorism with its own weapons. Authority would thus be giving tacit approval to manœuvres which are fundamentally opposed to the principles of the law which it has, moreover, officially endorsed on ratifying the Geneva Conventions and proclaiming the declaration of Human Rights. One cannot hope to achieve improvements in human society if such a degradation of institutions and public morality is tolerated. Those responsible should therefore not close their eyes to reprehensible actions committed by their subordinates.

In the face of so many abusive acts of violence which are committed in the world, it is also to be feared that these will increase and perpetuate themselves indefinitely by a fatal chain of events. Cruelty, through the hatred which they invoke calls for vengeance. reprisals and, consequently, further violence. One is then drawn into a vicious circle, from which it would later be practically impossible to extricate oneself.

Finally, there exists the great risk that an increase in brutality and ill-treatment, the organizing of terrorism or counter-terrorism might create, as regards these odious methods, a redoubtable inurement which would consequently weaken moral conscience and even the sensibility of individuals and masses towards them.[1]

3. Everyone is entitled to recognition as a person before the law.

It is not sufficient to protect a man's physical and moral integrity. His personality before the law should also be respected and he

[1] See Henri COURSIER: L'interdiction de la torture, *Revue internationale de la Croix-Rouge*, May 1952.

should be guaranteed the full exercise of his civic rights, notably those of going to law and signing contracts, otherwise his whole existence would risk being compromised.

This recognition figures unrestrictedly in the Universal Declaration. It obviously only applies to majors before the law, not under restraint and capable of discernment.

The same affirmation of principle can be found in the Geneva Conventions. It is however qualified by one reservation, namely that the exercising of civic rights can in fact be reduced, but only in proportion to which the captivity requires it. This limitation is legitimate. For, in the mere fact of his being a prisoner of war or an interned civilian, a man finds his freedom of movement and action restricted. That is sufficient to prohibit him from performing certain juridical acts.

Finally, in the sphere of public law, none may be arbitrarily deprived of his nationality.

4. Everyone has the right to respect of his honour, his family rights, his convictions and habits.

Man is particularly sensitive as regards his honour and self-respect. One has seen individuals placing their moral beliefs above their own lives. Humanity therefore demands that they are given consideration. Moreover, is not mere politeness already a first step towards peace?

This is now the place to speak of human dignity. This possesses two meanings. The respect which one owes oneself and which one should therefore accord to others by avoiding outraging their feelings, such is human dignity which must be taken into consideration in the sphere of law. On the other hand, the second meaning which can be found in so many emphatic declarations implies a belief in the eminence and nobility of man belonging *a priori* to a superior essence. Now, this is a qualification which the individual bestows on himself and which some regard as pretentious. Stoicism claimed to base this notion on reason and Kant on man's faculty to act in accordance with his duty, but these, it is scarcely necessary to say, are mere postulates, since its appreciation remains subjective.

There is no need to stress the unparalleled value of family ties. It is so considerable that the unscrupulous do not hesitate to exploit it to force people to perform acts of which they disapprove. To threaten a man through his affections is possibly the most cowardly and basest action which can be imagined.

As regards philosophical, political or religious convictions, these are deeply rooted in men. If they were to be deprived of them, they would no longer be complete. For one cannot live on bread alone. It was therefore recognized that everyone has the absolute right of having a religion or of not having one. The same applies to customs, for habit becomes second nature. How many primitive races, subjected by force to a stereotyped civilization, and been uprooted from their ancestral customs from which they drew their creative energy, have not rapidly declined?

5. Anyone who is suffering shall be sheltered and receive the care which his condition requires.

It was to fulfil this imperative duty that the First Geneva Convention was concluded in 1864. It is its corner-stone and from which all the Conventions' other obligations derive. It is not sufficient to respect the wounded and sick, they should also be given care without which they risk succumbing. By suffering is meant not only all pain, but also all threats to health and the security of the person, even if these are not painful.

Conceived for the military in time of war, this principle is by inference valid for civilians and in time of peace. In this last case, it takes on the more positive aspect, that of the maintenance of health and the prevention of sickness. As it has been defined by the World Health Organization " health is a state of complete physical, mental and social well-being, and does not consist only in an absence of sickness or infirmity ".

However, no such principle yet figures in the Universal Declaration, in view of the still embryonic character of medical aid in the developing countries. International medical circles recently proposed to have inserted in it the following stipulation: " every man has the right to aid if he is wounded or sick ".

6. Everyone has the right to exchange news with his family and receive relief parcels.

There is nothing so undermining for morale than anxiety about the fate of those nearest to us. When circumstances beyond their control oblige members of a family to be separated, they must be able to correspond with each other. Captivity should not force these essential bonds to be broken. Such, moreover, is the raison d'être of the Central Tracing Agency, which the International Committee of the Red Cross has set up by virtue of an express mandate entrusted to it by the Geneva Conventions.

Similarly, relief parcels prepared by friendly hands, and which bring with them thoughts of the home country, are not only materially valuable, they also give moral help in making captivity, distance and distress more bearable.

7. None may be arbitrarily deprived of his own property.

It is not attaching an exaggerated value to material goods to observe that in the present concept of society, property is inseparable from life.

PRINCIPLE OF NON-DISCRIMINATION

Individuals shall be treated without any distinction based on race, sex, nationality, language, social standing, wealth, political, philosophical or religious opinions, or on any other similar criteria.

In order thoroughly to grasp this principle, it is necessary first of all to discuss a delicate and often debated problem: that of the equality of rights amongst men. For this purpose we have to return to first ideas.

We will submit first of all that one cannot establish relationship between things which are fundamentally different such, for example, as a camel and a needle. One can only speak of equality or inequality between two or several objects if they have at least one point in common, known as the factor of comparison. Take colour, for example; one can resort to a notion of equality if the colour is the same and of inequality, if it is different.

We then submit that all things which are equal in some of their aspects are at the same time unequal under other aspects. Even if two spheres have the same volume, weight and colour they will still be distinctive by the place they occupy in space, otherwise there would only be one sphere and one would no longer speak of equality, but of identity.

Let us consider two spheres of the same colour, but of different volume. If we say that they are equal we disregard their volume. If we call them unequal, we do not take their colour into account. It can thus be seen that the notions of equality and inequality, outside the abstract field of mathematics, can only ever be appreciated from a particular angle. They are always qualified, subjective and relative.

What is applicable to objects, is also true of human beings. These are both equal and unequal at the same time, that is to say, they are equal between themselves in certain respects and unequal in others, to an extent which varies according to each individual. This equality and this inequality can only be appreciated in accordance with the particular aspect being considered.

It is because of this fundamental truth, so long unrecognized, that two sorts of justice exist. The one, known as commutative, gives equal quantity to subjects considered as being equal. The other, called distributive, gives different quantity to subjects regarded as unequal.[1]

When should appeal be made to one or the other? Whilst, for just motives, it is the aspect of equality or inequality between men which will decide.

Humanitarian morality prescribes the necessity of guaranteeing to all individuals certain essential rights inseparable from the human being and the life of the community. It also demands that a part of the world's riches is distributed to them according to their needs and assuring them of decent conditions of existence. As regards rights, men are considered under the angle of equality. As far as needs and distribution of material goods are concerned they are considered as being unequal.

[1] These theoretical points have been taken from the excellent work by Mr. Hans NEF: *Gleichheit und Gerechtigkeit*, Zurich, 1941.

The question of *equality* can first be broached. If one has reached the stage in social morality at which the recognition of rights is recognized, it is not for a profound and absolute, a " transcendental " reason, but, contrary to what is generally believed, for reasons of expediency which are all relative. The equal value of individuals is a postulate which is constantly disproved by the facts. They are, on the contrary, distinct by their physical, intellectual and moral qualities. What is suffering for some is not the case for others. By applying equality of treatment to beings who are different is to obey a mathematical rule, but not that of equity nor of a feeling of humanity.

Parity can only be the expression of the highest form of justice when it aims at identical people and in similar circumstances. We know, however, that this is a myth. In speaking to different beings, the ideal would require one to give to each not the same thing as to others, but what suits him personally, because of his character, his tastes, in other words, his own situation.

However, such a method of sharing is not practicable in the abstract field of individual rights. First of all it would presuppose a deep knowledge of each individual case. These are most numerous and nearly always complicated. So many factors must be taken into account that one would soon find oneself lost. Furthermore, to embark on distinctions would be extremely hazardous since one would risk becoming entangled in the labyrinth of subjective appreciation. It would be most likely that in looking for equity one would, more often than not, find partiality and error.

That is why society has determined to base itself on equal rights between men. This notion has in the long run shown itself to be the most obvious and convenient way of dealing with relations between individuals. It will do no serious harm to anyone and even if it does not enable the highest form of justice to be reached, it at least offers the maximum chances of already attaining a certain level of justice.

We can take political rights as an example of this. The system of universal suffrage has triumphed practically everywhere in the world. None any longer favours the system of assessment by which the right to vote was based on a property qualification. Universal suffrage starts with the idea that all men possess a certain grain of

reason which makes them capable of taking part in public affairs. However, this would be a most hazardous assertion. One could think, on the contrary, that the destiny of a country should be entrusted to its best citizens, the wisest, the most intelligent, the best educated. But how can one know them? One would have to delve into each one's personality. In view of the impossibility of choosing such an élite without being mistaken and have one's choice accepted by the community, one has come round to recognize the same powers for all, with the exception of those with reduced responsibility such as the mentally sick and persons undergoing sentences.

However relative it may be, the principle of equality is not without value. It has already " enabled the two worlds, that of the masters and that of the servants to meet and fuse into a single whole ".[1] It is not after all, neither " the immortal principle " of the revolutionary declarations nor the " monstruous fiction " which Burke attacked in 1852.

The aspiration men have for more justice makes them, in the absence of a natural equality which fate denies them, hope for an equalization of their chances and their condition. By a spirit of equity, they are led to extend its benefits to all human beings and in a spirit of humanity not even to exclude from it those whom they hate. From this originates the idea of non-discrimination, the ultimate outcome of the wish for equality.

We can define discrimination between men, a new term always with a derogatory meaning, as being a distinction or a segregation practiced to the detriment of certain individuals, for the sole reason that they belong to some particular category. One can therefore call " discriminatory treatment ", unequal treatment which through action or by abstention will result from such an attitude.

Discrimination is always carried out for motives outside the concrete case. It operates because one only considers, in a given case, those factors which mark some inequality between men in a sphere in which equality ought to predominate.

The principle of non-discrimination originally found expression in the Geneva Conventions, namely that a soldier rendered hors de

[1] Jean-G. LOSSIER, *Les civilisations et le service du prochain*, Paris, 1958.

combat by wounds or sickness shall be aided whether he be friend or enemy with the same readiness. Until 1929, the Convention only prohibited distinctions based on nationality. In 1949, distinctions were excluded which were grounded on " race, colour, religion or faith, sex, birth or wealth, or any other similar criteria ". These show well enough that all discrimination is forbidden and that those mentioned in the text are only given by way of examples. Evidently, they were previously prohibited by implication. It was the sorrowful experience of the Second World War which obliged them to be set forth in writing.

A similar formula can be found in the Universal Declaration of Human Rights. Mention however is not made there of nationality, for in this sphere there exist legitimate cases where the alien will not possess the same rights as the national of a country.

Let us now study the question of *inequality* between men. Since the end of the XVIIIth Century it has been understood that there is no reason for the world's wealth to be in the hands of a privileged minority. It is also known that suffering, poverty, sickness and ignorance are not the inevitable lot of the great mass of people.[1] One has therefore claimed for each one a portion of the common heritage, a place in the sun, a share of happiness. Without wishing to establish complete equality between men, which would be nonsensical, an attempt has been made to find a compromise, namely to offer a minimum of advantages to all, something which each one asks for himself and which he is prepared to recognize for others. That is what is known as equality of treatment.

However, men have basically different needs, either on account of their own natures, or because misfortune has destroyed equality amongst the living. Justice demands that the balance be re-established. Now, to bring men to the same level is to concern oneself the most effectively and first of all with those who have least. This means distributing aid in proportion to the distress involved. One can only remedy some inequality in a situation by making unequal provision.

One can take public taxation as an example. There was a time when only the poor paid taxes. This crying injustice was moreover

[1] Gaius EZEJIOFOR, *Protection of Human Rights under the law*, London, 1964.

one of the causes of the French Revolution. Does equity demand that each person pays the same tax? By no means, as the principle of due proportion has been everywhere accepted. Everyone pays his contribution in relation to what he earns and possesses. Even more, a system of progression is now employed. The wealthy take a more than proportional part from the State's expenditure, for the more a person's resources are far from the vital minimum, the more the excess increases which can be heavily tapped. In this case, a just reason based on economic considerations has been taken into account.

It can be seen that the principle of non-discrimination, mentioned above, cannot be understood in the absolute sense. Some corrective to it is necessary. There are in fact distinctions which it is legitimate and even necessary to make. In the framework of humanitarian law, it will be those based on suffering, distress or natural weakness, and only those.

The Geneva Conventions, revised in 1949, are no longer silent on this point as was formerly the case. They prohibit " unfavourable " distinctions. The term is inadequate, but it was meant to signify that there are permissible even obligatory distinctions. Thus, as is stated, women will be treated with all the regards due to their sex. Similarly, it is normal to favour children and the aged. It has also been admitted that special conditions of accommodation, heating and clothing be granted prisoners accustomed to a tropical climate who may find themselves in a cold region.

Alongside the quantitative inequality of treatment, the Conventions establish even more clearly its inequality in time. Thus they stipulate that " only urgent medical reasons will authorize priority in the order of treatment to be administered ". Let us suppose that somewhere the Army Medical Service had to cope with an influx of wounded. The medical officers, without taking nationality into account, would first of all care for those for whom delay would be fatal, or at least highly prejudicial, then they would deal with those whose condition would not require immediate attention. In the same way, distributions of food and medicines should be based on the most urgent need.

In so far as Human Rights are concerned, distinctions which are permissible are to be found in economic and social rights. To

ensure that individuals have adequate conditions of existence, one should take into account their personal situation, needs and capabilities which are eminently variable. When one says that everyone has the right to work, this does not mean that each has the right to become a director, but should have a position in accordance with his capability.

There is so much truth in this that the great principle of non-discrimination should be completed by a principle of application as follows: *Differences in treatment should however be made for the benefit of individuals in order to counter inequalities resulting from their personal situation, their needs or their distress.*

PRINCIPLE OF SECURITY

Everyone has the right to security of person.

The principles of application define the content of this general principle. These are:

1. None can be held responsible for an act which he has not committed.

2. Reprisals, collective punishments, the taking of hostages and deportations shall be prohibited.

This last principle derives directly from the previous one. It is only valid in time of conflict. Such prohibitions which now figure in the Geneva Conventions are certainly remarkable achievements in the development of humanitarian law.

Reprisals, by which one means repressive acts which a State is led to direct against an adversary in answer to illicit acts carried out by him, are still, generally speaking, admitted in international law as the only method of coercion available to a State, in time of war, to oblige an opponent to respect his obligations.

It runs however counter to the principle of law which lays down that no innocent person shall suffer for one who is responsible. Furthermore, it causes much suffering and nearly always misses its object. At all events, reprisals against persons protected by the Geneva Conventions are absolutely prohibited. This prohibition

accords with the modern evolution of international law, another step forward for the principle of State sovereignty.

This also applies to collective penalties. These are now totally prohibited by the Geneva Conventions, whilst article 50 of The Hague Regulations still tolerated them in principle. Thus the Latin concept of personal responsibility prevails over the Germanic notion.

Article 34 of the Fourth Geneva Convention of 1949, the shortest of all, striking in its simplicity, by stipulating the " taking of hostages is prohibited ", is a complete innovation in international law. It has put an end to a reprehensible and cowardly practice of which the two world wars have seen only too many examples.

After the forced transfers of such large numbers of persons during the Second World War and the resulting immense distress, one must highly appreciate the provision of article 49 of the Fourth Convention which prohibits deportations. This practice has already been condemned in the doctrine and handbooks on the laws of war, but they were not the subject of any provision in international law.

3. Each person shall benefit from legal guarantees recognized by civilized peoples.

These guarantees are chiefly as follows: none can be subjected to arbitrary arrest or detention; no one shall be held guilty except on the basis of a law and by virtue of a sentence pronounced by a court regularly constituted and presenting the requisite conditions of impartiality; penal law shall not be retroactive; an accused person shall be presumed innocent until proved guilty; everyone charged with a penal offence shall be given assistance in his defence and be entitled to the hearing of his own witnesses.

4. None can abrogate the rights which the humanitarian Conventions accord him.

This is a question of a provision of the Geneva Conventions framed to prevent practices which were only too prevalent in the Second World War. Such practices tended to offer to protected persons a more apparently favourable status, but which in fact deprived them of benefiting from the Conventions. Such status

resulted more often than not in special agreements which gave the impression that the detaining authorities were giving those concerned the possibility of choosing their own conditions of existence. In point of fact, pressure was put upon them, if only by enticing them with more or less fictitious advantages.

The Diplomatic Conference adopted a radical solution by protecting the victims of conflicts against themselves. It considered that persons in the power of the enemy are not in fact in a sufficient position of independence or objectivity enabling them to take decisions with full responsibility and appreciate the consequences of their revocation.

(To be continued)

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